In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1640

STANDARD EDUCATORS, INC. AND JAMES A. MELLEY, SR., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a)[1] is reported at 475 F. 2d 401. The opinion of the Federal Trade Commission (Pet. App. 18a-60a) is not officially reported.

JURISDICTION

The amended judgment of the court of appeals (Pet. App. 16a-17a) was entered on April 16, 1973. The petition for a writ of certiorari was filed on June 7,

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari. "App." refers to the joint appendix in the court of appeals.

1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a Federal Trade Commission cease-and-desist order prohibiting a closely held family corporation's unfair and deceptive practices properly also ran against the corporation's President, who was its majority stockholder.

2. Whether petitioners were entitled to obtain field reports and notes of a Commission investigator in order to refresh the recollection of petitioner's own witnesses.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45, is set forth in pertinent part at Pet. 2-3.

STATEMENT

The petition seeks review of a decision of the court of appeals (Pet. App. 1a-15a) affirming a unanimous decision of the Federal Trade Commission (Pet. App. 18a-60a). The Commission held that Standard Educators, Inc. engaged in unfair and deceptive practices in the door-to-door sale of encyclopedias in violation of Section 5 of the Federal Trade Commission Act and directed Standard Educators and its president to cease and desist such practices.

Standard Educators, Inc. was formed in April 1957 by petitioner, James A. Melley, Sr. (App. 155). Throughout the life of the corporation, Melley was President and Treasurer, and his wife, Margaret J. Melley, was Corporate Secretary (App. 155). Melley has always owned 51 percent of the company's stock

while his wife has always owned 46 percent (Pet. App. 23a).

Standard Educators is exclusively engaged in the public sale and distribution of various books, including the "New Standard Encyclopedia" and supplements thereto. Standard Educators buys encyclopedias and other books from publishers and resells them on a retail basis to householders by door-to-door canvass (App. 156).

The Commission's complaint named as respondents both Standard Educators and Melley, the latter as an individual and officer of the corporation. It charged that in selling encyclopedias door to door they made various false and deceptive statements relating to the terms and conditions of sale (App. 5-9). The complaint specifically cited as false and deceptive the representations that the corporation was offering a set of the "New Standard Encyclopedia" "free" or at a specially reduced price to "specially selected persons" in return for a letter endorsing the encyclopedias, display of the product in the prospect's home, and an agreement that the customer will keep the encyclopedia current by purchasing the annual yearbook for ten years (App. 7); that the encyclopedia offer was a special introductory or reduced price offer available to a specially selected group of people, *i.e.*, members of the Armed Forces; that certain books included in the "combination offer" are given free with the purchase of the annual yearbook for a period of ten years; that the special terms and conditions of this offer are available only at the time of the call on the prospective customer; and that the additional cost of $3.95 for the annual yearbook is for postage and handling charges (App. 7, 8).

At the hearing, the Commission staff offered testimony with respect to 12 sales which took place be-

tween February 1965 and May 1968 in such places as Hawaii, Colorado, New Hampshire and Maryland. The oral misrepresentations charged in the complaint were made in each case (Pet. App. 2a).

The Hearing Examiner concluded that the allegations against the corporation had been proven, and that a cease-and-desist order should issue. Petitioners do not challenge the factual basis of this finding (Pet. App. 22a). The Examiner ruled however, that the order should not name Melley as an individual. The Commission upheld the Examiner's decision and order, except that it expanded the order to cover Melley as well, because it "found substantial personal involvement by the respondent in authorizing and approving the illegal practices of the corporation * * *," as well as "ownership and control of the corporation * * *" (Pet. App. 31a).

The Commission also concluded that the Examiner had erred in failing to order the production of investigative reports for petitioners' use in cross-examining a Commission investigator with respect to whether Melley consented to the investigator's search of corporate records. The Commission declined to reopen the hearing, however, on the ground that Melley's own testimony established that he consented to the search.

The court of appeals affirmed *per curiam*. It held that the record supported the determination that Melley "knew of and authorized the deceptive practices * * *" (Pet. App. 4a), and that the petitioners' other contentions were not sufficiently meritorious to warrant discussion. Judge Wilkey dissented with respect to upholding the order against Melley. In his view the record did not provide sufficient evidence of Melley's personal involvement in the formulation and direction of the deceptive practices to warrant his inclusion in the order.

ARGUMENT

The Commission's decision rests upon factual findings which are supported by substantial evidence and which are the product of a fair hearing. The court of appeals fully considered and properly rejected petitioners' contentions, and further review is unwarranted.

1. The decision below applies settled principles to the particular facts of this case. The difference between the majority and dissenting opinions over the propriety of including Melley in the order merely reflects a disagreement with respect to the inferences to be drawn from the evidence presented. The majority properly concluded:

> The same oral misrepresentations were made in every one of these cases, and in each the pattern of deception was facilitated by the contract written by Mr. Melley. The Commission does not engage in speculation when it rejects the conclusion that these similarities occurred purely by coincidence and instead infers that they were the result of direction from above. [Pet. App. 2a-3a.]

The Commission correctly applied the standards enunciated in *Fred Meyer, Inc.* v. *Federal Trade Commission,* 359 F. 2d 351, 367-368 (C.A. 9), certiorari denied, 386 U.S. 908, respecting individual liability of corporate officers. It concluded that coverage of Melley in the cease-and-desist order was necessary to insure its effective implementation. In *Fred Meyer,* the court of appeals sustained the Commission's decision holding two officers of the corporate respondent liable in their individual capacities, based on the following considerations: (1) the officers owned and controlled the closely-held family corporation; (2) they set the policies and reviewed the practices of the corporation;

and (3) they knew of and authorized the alleged illegal practices (Pet. App. 26a).

All of these considerations are present in this case. Mr. Melley and his wife own almost all of the stock (Pet. App. 23a). The Commission found that Melley supervises the overall operation of the company and cited Melley's own testimony that he acts as "the boss" in supervising corporate business and resolving corporate problems (Pet. App. 28a). Melley personally developed the form contract which "was an integral part of the deceptive sales practices challenged in the complaint * * *" (Pet. App. 28a). In view of his central role in the operation of the corporation, the Commission properly concluded that he was aware of the sales tactics of his salesmen and approved the overall operation of the deceptive and illegal scheme.

Courts have frequently upheld the inclusion of individuals in cease-and-desist orders in similar circumstances. See, *e.g.*, *Benrus Watch Co.* v. *Federal Trade Commission*, 352 F. 2d 313 (C.A. 8), certiorari denied, 384 U.S. 939, *Pati-Port, Inc.* v. *Federal Trade Commission*, 313 F. 2d 103 (C.A. 4). Petitioner's reliance on *The Lovable Co.*, 67 F.T.C. 1326, and *Flotill Products, Inc.* v. *Federal Trade Commission*, 358 F. 2d 224 (C.A. 9) (Pet. 10-11), is misplaced. In *Lovable* the Commission found that there was no indication that the officers controlled the corporation. In *Flotill* the court found that the record was devoid of evidence that the individuals in question had violated the Act or were likely to do so in the future.

2. Petitioners also contend that the Commission improperly denied them access to reports prepared by a Commission investigator which might have assisted them in establishing that the investigator coerced Melley's consent to a search of corporate records. The Examiner

found that Melley in fact consented to the search, based at least in part on the testimony of the investigator. The Commission agreed that the documents should have been produced, but cured this error by striking the investigator's testimony. On a review of the remaining evidence, the Commission found voluntary consent to the search on the basis of the testimony of petitioners' own witnesses (Pet. App. 32a).

Petitioners contend that the Commission's action did not eliminate the prejudicial effect of denying access to the investigator's report because the report might have been useful in refreshing the recollection of petitioners' witnesses. The Commission rejected this claim "that an investigator's work product must be turned over to the respondent to jog the memory of its own witness" (Pet. App. 32a, n. 6). The Commission's conclusion was correct. Documents prepared in expectation of litigation are available for discovery only upon a showing of special circumstances. *Hickman* v. *Taylor*, 329 U.S. 495. Petitioners did not make such a showing. See Rule 26(b)(3), Federal Rules of Civil Procedure.[2]

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[2]The three cases petitioners cite do not establish that they were entitled to these documents. In *Knoll Associates, Inc.* v. *Federal Trade Commission*, 397 F. 2d 530 (C.A. 7), evidence indicated that the documents had been stolen from the respondent in the Commission proceeding. In *Baker* v. *United States*, 401 F. 2d 958 (C.A.D.C.), the defendant was seeking to determine whether evidence had been obtained through illegal wiretapping of his conversations. The decision in *United States* v. *Como*, 340 F. 2d 891 (C.A. 2), did not involve the discovery of documents.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1973.

DOJ-1973-07